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StudiVZ Ltd.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FACEBOOK, INC.,

Plaintiff,

v.

STUDIVZ LTD.,
VERLAGSGRUPPE GEORG VON
HOLTZBRINCK GmbH,
HOLTZBRINCK NETWORKS
GmbH, HOLTZBRINCK
VENTURES GmbH, and DOES 1-
25,

Defendant.

Case No. 5:08-CV-03468 JF

Assigned To: Hon. Jeremy Fogel

**SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF DEFENDANTS'
MOTIONS TO DISMISS FOR LACK
OF PERSONAL JURISDICTION OR,
IN THE ALTERNATIVE, FOR
FORUM NON CONVENIENS TO
INFORM COURT OF NEW
GERMAN ACTION**

[Declaration of William M. Walker and
Supporting Exhibit Filed Concurrently
Herewith]

Date: February 13, 2009

Time: 9:00 a.m.

Dept./Place: Courtroom 3

Complaint Filed: July 18, 2008

1 Defendants StudiVZ Ltd. (“StudiVZ”), Holtzbrinck Networks GmbH
2 (“Networks”) and Holtzbrinck Ventures GmbH (“Ventures”) (collectively
3 “Defendants”) respectfully seek permission to file this supplemental memorandum
4 in support of their Motions to Dismiss for Lack of Personal Jurisdiction or, in the
5 alternative, for *Forum Non Conveniens* (the “Motions”). (Docket Nos. 41, 42).

6 After Defendants’ Motions were filed in November, plaintiff Facebook, Inc.
7 (“Facebook”) filed a new lawsuit against StudiVZ in Cologne, Germany.
8 Facebook’s lawsuit is based upon the identical facts and conduct as Facebook’s
9 California action against StudiVZ and the other defendants (the “California
10 Action”). The fact that there are now *two* German actions between the parties on
11 these same issues that are raised in this California Action weighs heavily in favor of
12 a *forum non conveniens* ruling in this Court.

13 Defendants seek to bring this information to the Court’s attention now (rather
14 than in their forthcoming reply memorandum), in order to give Facebook an
15 opportunity to address these issues in its opposition to the Motions.

16
17 **I. BACKGROUND**

18 As discussed in the Motions, Facebook, Inc. (“Facebook”) filed the California
19 Action on the same day that StudiVZ filed its own lawsuit against Facebook in the
20 *Landgericht Stuttgart* (district court Stuttgart) in Stuttgart, Germany (the “First
21 German Action”). In the First German Action, StudiVZ seeks a declaratory
22 judgment that StudiVZ does not infringe or violate any of Facebook’s rights.

23 Defendants brought the Motions because: (1) they lack sufficient contacts
24 with California for this Court to exercise jurisdiction over them; and (2) Germany is
25 the proper forum to resolve the parties’ disputes. As discussed in the Motions,

26 (a) there is already a German action between StudiVZ and Facebook;

27 (b) all of Defendants’ alleged actions took place in Germany;

28 ///

(c) Facebook alleges that it has suffered harm primarily in Germany and other parts of Europe;

(d) all of the people who could have possibly engaged in the conduct alleged by Facebook are located in Germany;

(e) those witnesses speak German as their native language, and most would require translators to testify in a United States legal proceeding; and

(f) nearly all of the documents related to Facebook's allegations are located in Germany, and the vast majority of those documents are written in German, thus requiring huge translation costs to be used in a United States legal proceeding.

(See, e.g. Brehm Decl. ¶ 18) (Docket No. 47).

II. FACEBOOK HAS NOW FILED ITS OWN LAWSUIT IN GERMANY.

Since Defendants' Motions were filed last month, Germany's connection to the parties' dispute has grown significantly.

On November 19, 2008, Facebook filed a lengthy response in the First German Action, presenting all of Facebook's defenses and evidence (the "Response") (Declaration of Dr. Anton G. Maurer ["Maurer Decl."], ¶ 4(d); Ex. O) (Docket No. 65); (Declaration of William M. Walker ["Walker Decl."], ¶¶ 3-4).

On the same day, Facebook filed an eighty-eight page long, single-spaced Complaint at the "*Landgericht Köln*" (district court Cologne), in Cologne, Germany against StudiVZ (the "Second German Action") (Exhibit "B1" to Facebook's Response in the First German Action). (Maurer Decl., ¶ 4(d)) (Docket No. 65). The Second German Action is based on the identical facts and conduct as the California Action and seeks affirmative relief against StudiVZ (including monetary damages, injunctive relief, and an accounting). (Walker Decl., ¶¶ 4-6; Ex. F, pp. 2-3).

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1 **III. WITH THE SECOND GERMAN ACTION, EVEN FACEBOOK**
2 **ACKNOWLEDGES THAT GERMANY IS THE PROPER FORUM.**

3 Putting aside its lack of merit, Facebook's dispute against StudiVZ does not
4 belong in a California court. The fact that Facebook has now filed its own lawsuit
5 in Germany against StudiVZ lays to rest any question that Germany is the proper
6 forum for the parties' disputes.

7 The Second German Action was filed by Facebook following threats to do so
8 that began more than two and one half years ago.

9 On June 8, 2006, Facebook's German counsel sent StudiVZ a demand letter
10 written in German, invoking German law, and threatening a lawsuit in Germany.
11 (Declaration of Stephen S. Smith ["Smith Decl.,"] ¶ 22; Exs. K-L) (Docket Nos. 64,
12 64-9, 64-10).

13 Thereafter, on January 3, 2007, Facebook sent StudiVZ another demand letter.
14 It was also drafted by a German law firm, written in German, invoked German law
15 and threatened to sue in Germany. (Smith Decl., ¶ 23; Exs. M-N) (Docket Nos. 64,
16 64-11, 64-12).

17 Only *after* StudiVZ filed the First German Action against Facebook did
18 Facebook follow through on its threat to sue StudiVZ in Germany. Notably,
19 Facebook filed the Second German Action *after* Defendants filed their Motion to
20 Dismiss for *Forum non Conveniens* in this Court.

21 Facebook's filing of the Second German Action particularly impacts factors
22 six and seven of the Ninth Circuit's seven factor *forum non conveniens* test. *Core-*
23 *Vent Corp. v. Nobel Industries AB*, 11 F.3d 1482, 1487-88 (9th Cir. 1993).

24 Factor six considers whether Facebook would be able to obtain effective relief
25 in another forum. Now that Facebook is the plaintiff in the Second German Action,
26 in which it seeks several forms of affirmative relief (including but not limited to
27 monetary and injunctive relief and an accounting), there can be no doubt that
28 Facebook will be able to achieve effective relief there if its complaint has merit.

Factor seven considers the existence of an alternative forum. **Facebook** bears the burden of proving that an alternative forum is **unavailable**. *Core-Vent*, 11 F.3d at 1490. Not only is an alternate forum available in Germany (both in Stuttgart and Cologne), but **Facebook itself** has acknowledged the existence of that forum for more than two and one half years (beginning with the sending of its first German demand letter), and has now purposefully availed itself of that alternative forum by filing a lengthy and comprehensive lawsuit there.

Simply stated, the Second German Action solidifies the already extremely close connection between Germany and the parties. Because the Second German Action is based on the identical facts and conduct as the California Action, and because it seeks affirmative relief against StudiVZ (including monetary damages), there is no rational reason for the California Action to proceed. Therefore, for this reason, as well as all the reasons previously set forth in the Motions (and those that may be set forth in any Reply memoranda), Defendants respectfully request that the Court grant the Motions to Dismiss.

DATED: December 18, 2008

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By: /s Stephen S. Smith
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Attorneys for Defendant STUDIVZ LTD.